United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

640

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,309

UNITED STATES OF AMERICA, APPELLEE

v.

ROGER TOLBERT, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JOHN JUDE O'DONNELL
(Appointed by this Court)

I N D E X

TABLE OF CASES

STATEMENTS OF ISSUES PRESENTED FOR REVIEW

In the opinion of appellant the following issues are presented:

1. Was it error for the trial court to permit the government to cross-examine appellant outside the scope of his direct testimony?

2. Was it error for the trial court to permit the government to impeach appellant by evidence of a conviction when the harm it would do clearly was outweighed by the need to have appellant's testimony on the issue of his mental condition at the time of the crime?

This is the first time this case has been before this Court.

STATEMENT OF THE CASE

Jurisdiction

On October 30, 1967, an indictment was filed in the United States District Court for the District of Columbia charging Roger Tolbert with robbery. On November 9, 1967, appellant entered a plea of not guilty to the indictment. On June 26, 1968, the trial in this matter was held before the Honorable Oliver Gasch, United States District Judge for the District of Columbia. On July 1, 1968, the jury entered its verdict of guilty on the charge of robbery. On August 9, 1968, appellant was sentenced to a term of imprisonment for a period of three to ten years. The trial court subsequently granted appellant leave to proceed on appeal without payment of costs. This appeal follows.

The Trial

The complaining witness, Maria Pirrone, testified that on September 7, 1967, she had been shopping in the vicinity of 12th and G Streets, N. W., Washington, D. C. When her errands were completed she went to the bus stop. When the bus came, she was boarding when she felt someone poking her in the back, at which time she turned around

and saw her purse open. (Tr.18-19) She also observed two individuals in a scuffle, one of whom later turned out to be a police officer. Her billfold, with $7.00 in it, was on the step of the bus. (Tr.20,22)

The next witness was Marshall Janifer, a detective who on the day in question was assigned to the Criminal Investigation Division, No. 1 Precinct. About 1:20 p.m. he, together with Detective James O. Williams, observed appellant at the intersection of 12th and G Streets, N. W. in the company of another man. (Tr.25-26) He saw appellant position himself behind Mrs. Pirrone as she boarded the bus. In front of Mrs. Pirrone at this time was the individual who had been observed in the company of appellant earlier. This individual bent over, causing the boarding to stop. Appellant placed his hand into Mrs. Pirrone's pocketbook and took out a brown leather wallet. At this time Detective Janifer identified himself and placed appellant under arrest. Appellant dropped the brown leather wallet on the steps of the bus. (Tr.28-29) On cross-examination Detective Janifer testified that he had seen photographs of appellant at police headquarters in an album of suspects, Murphy men and confidence operators. (Tr.36-37)

The next witness was Detective James O. Williams,

Criminal Investigation Division. (Tr.51) He was on duty with Detective Janifer on the day in question, and observed appellant at the intersection of 12th and G Streets, N. W. (Tr.52) A companion of appellant known to Detective Williams as 'McKinney' positioned himself in front of Mrs. Pirrone in order to enter the bus first. Appellant then moved up close behind her. Next, he observed Detective Janifer arresting appellant. He placed McKinney under arrest. (Tr.54)

At the conclusion of the government's case, the usual motion was made and denied by the Court. (Tr.59)

Before going forward with his case, counsel for appellant indicated that at first he had advised appellant not to take the stand. (Tr.59) Later he made a request of the Court to permit him to limit his direct examination of appellant to facts pertaining to his narcotics addiction, thereby precluding the government from cross-examining outside of this scope. The Court then ruled that the government "can examine him as to any aspect of the case,. . ." (Tr.61) Counsel for appellant further indicated that the Luck issue in his opinion was not involved "because the nature of this trial, it is my opinion, if his record would be brought out that it would support to some extent the insanity defense" and reiterated his inquiries as to whether the Court would

permit the government to go into the facts of the crime on cross-examination if appellant's direct examination was limited solely to the narcotics addiction. (Tr.62) The Court said ". . .I think each side is entitled to some leeway in cross examining a witness, particularly where credibility of a witness is one of the issues in the case." (Tr.63) The Court also said that it "would permit the Government to bring out a portion of his prior record,. . ." (Tr.64)

The first witness for appellant was Mrs. Lottie Smith, his mother. She said appellant was born on November 22, 1942. (Tr.65-66) His father had died when he was quite young and she had remarried. In his early teens, because of his actions Mrs. Smith took her son to see a psychiatrist, who indicated to her that that which he was doing was "just the teenage stage." (Tr.65-67) By the time appellant was 15 or 16 he was sent to the Receiving Home, after which he returned to her home and did "unusual things," subsequently being sent to the Youth Center. (Tr.68-69) After he returned he appeared physically sick to her. She knew there was something wrong with him. (Tr.72) She felt he had behavior problems for over 5 years. (Tr.83)

The next witness for appellant was George Weickhardt, M. D. Dr. Weickhardt was a psychiatrist on the staff of St.

Elizabeths Hospital. He had first seen appellant on January 5, 1968 at St. Elizabeths Hospital. Here he was observed over a period of approximately 2-1/2 months by ward personnel. Appellant had physical examinations, psychological tests, and was examined by Dr. Weickhardt on 3 or 4 occasions. (Tr.96-97) It was his opinion that on September 7, 1967 appellant "was in an intoxicated state due to drugs which he had administered to himself. This dependence on drugs goes a long way back in his life." (Tr.98) Appellant began using drugs after he left the National Training School and eventually began giving himself injections of heroin. (Tr.100) He became "hooked" and required more and more of this drug because his body had been accustomed to it. (Tr.99,104) Most of appellant's time was spent in obtaining and injecting the heroin. (Tr.100) Heroin cost more than he could earn so he committed petty crimes such as stealing or shoplifting in order to pay for it. Dr. Weickhardt diagnosed his condition as "drug dependence." (Tr.101) This is a mental disease. (Tr.108) The knowledge of anticipated withdrawal symptoms "makes him try to get more." (Tr.102) He testified that an individual like this "has control, but he doesn't have complete control. He has a compulsion to get drugs by any means, although I think I should qualify that 'any.' There are certain limi-

to which a drug addict will go to obtain drugs." (Tr.103) It was his opinion that appellant had "an abnormal condition of the body and the mind. He was at the time, I believe, under the influence of a narcotic drug which had saturated his tissues, including his brain tissues and so on, and that this impaired his behavior controls." (Tr.105,116,155,204) Appellant seemed to go back to narcotics at every opportunity. Dr. Weickhardt also stated that narcotics addiction has some affect over people's control and people's ability to refrain from doing things as well as over their behavior controls. (Tr.160) Dr. Weickhardt further stated that addiction causes an overpowering desire to get more drugs often. (Tr.222) The American Psychiatric Manual classifies drug dependence as a mental disorder. (Tr.224) At the end of Dr. Weickhardt's testimony appellant concluded his case. (Tr.232)

In rebuttal, the government called Albert E. Marland, M. D., a psychiatrist. He had examined appellant on the Friday and Sunday prior to the trial. (Tr.233,237) Appellant admitted to him that he had been a narcotics addict since age 18. (Tr.242) As a result of his examination Dr. Marland was of the opinion that on the day of the crime appellant was not suffering from any mental disease or defect. (Tr.252) He agreed with Dr. Weickhardt that a narcotics addict had a

physical dependence on the heroin and that the body demands it and that if not received it hurts. (Tr.255) Dr. Marland, in addition, stated that a narcotics addict's behavior controls were not impaired to the point where the addict cannot choose what he ought to do. (Tr.271) The government then recalled Detective Janifer, who testified he had observed narcotics addicts on prior occasions going through withdrawal symptoms, and during the period of the arrest and the subsequent paperwork he did not observe appellant in this state. (Tr.283,289)

ARGUMENT I

The Trial Court Erred in Ruling It Would Not Limit the Scope of Cross-Examination to Appellant's Direct Testimony

Appellant contends that the trial court's refusal to limit the scope of appellant's cross-examination by the government to the direct evidence as indicated by appellant's counsel in his proffer was an abuse of discretion and error. It is recognized that what constitutes the extent of cross examination is almost exclusively a matter of discretion with the trial court. Nevertheless, the prosecution cannot have unlimited rights. Blitz v. United States, 153 U.S. 308 (1894). Enriques v. United States (9th Cir., 1961) 293 F.2d 783; cf. Baker v. United States, --U.S.App.D.C.--, 401 F.2d 958 (1968) at page 987.

In the instant case, at the close of the government's evidence counsel for appellant indicated to the Court that he was considering calling appellant to the stand to testify on the insanity issue and that alone. The Court indicated, in other words, that he would permit the government to cross examine on matters relating to all the facts in this case and not limited to the narrow issue of insanity. Appellant states this was an abuse of discretion in that it forced him to make an election whether to take the stand or not. If he took the stand he would have been subjected to cross-examination on matters he had no intention of refuting by direct evidence. This ruling would permit the government to elicit testimony on the issue of robbery, which they would not be entitled to if appellant exercised his right not to take the stand. This was not a bifurcated trial. None was asked. But it was clear from the beginning that appellant was not going to put on evidence to contradict or refute that evidence put on by the government in support of its indictment that this appellant had committed robbery. The government would have to sustain its burden on its own evidence on the robbery charge. The defense was, if the government met its burden, that at the time of the commission of his crime appellant had a mental disease and this act by him was the product of that

disease. There was no need to go into the facts of the crime on cross-examination of appellant. First, it was outside the scope of direct examination. United States v. Bender (7th Cir. 1955) 218 F.2d 869. Second, the Court was permitting the government to go over the details of the crime again out of appellant's mouth, in violation of his rights and in such a way that it would be difficult to distinguish between the relationship of those facts as pertaining to the crime and those facts as pertaining to the defense of insanity.

In Brown v. United States, --U.S.App.D.C.--, 370 F.2d 242, a somewhat similar situation presented itself to the trial court. Appellant was injured as a result of an altercation with a group of boys. Later, during a confrontation with police officers appellant ran home, secured a knife, and assaulted one of the officers. Appellant's defense was that at the time he assaulted the officer he was unconscious. Appellant had a prior conviction of assault with a dangerous weapon. An attempt was made by his counsel to persuade the Court to rule this conviction inadmissible on the issue of credibility under the authority of Luck v. United States, 121 U.S.App.D.C. 151, 348 F.2d 763 (1965). The request was denied and appellant did not take the stand. This Court in reversing found that the trial court had abused its discretion

and had misconstrued its role under the Luck decision and went on to say that this is a classic illustration of a case in which "the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility." (p.245) Now it is admitted that, strictly speaking, the issue raised in this argument does not fall within the purview of the Luck case; nevertheless, it is relevant. Appellant's subjective mental condition far outweighed the government's need to cross-examine on the facts of the crime. It therefore is clear that the trial court has erred, requiring reversal and remand for a new trial.

ARGUMENT II

The Trial Court Erred in Ruling It Would Permit the Government To Impeach Appellant by Use of a Prior Conviction

Appellant contends that the trial court abused its discretion when it indicated to counsel for appellant that if appellant took the stand he would permit the government to bring out a portion of his prior conviction record on the issue of credibility. The fact of appellant's prior arrests was crucial to his defense that he was not guilty by reason of insanity. These arrests were evidence of the fact that as

a result of his narcotics addiction, which was not disputed, his behavior controls were affected in that it was necessary for him to secure funds in order to satisfy his addiction. The evidence was clear that there were insufficient funds by working at a normal occupation to secure such funds, even if he was physically able to do so. But the fear of the instruction involving impeachment by proof of a conviction of a crime by an instruction to a jury placed appellant's attorney in a position where he had to make an election, not of his choosing, to recommend to appellant that he not take the stand. Appellant therefore was precluded from testifying on how long he had been an addict; how long the scars had been on his arm (Dr. Weickhardt had testified that this was one consideration he had used in determining appellant had a mental illness and drug dependence, but Dr. Weickhardt was unable to say how long the scars had been there); how great was his dependence; how severe were his withdrawal symptoms at the time of the commission of this crime; how frequent was his habit; how severe his anxiety; how strong his drive to secure money in order to pay for his habit, as well as the type of life that he was leading as a result of his mental problem. All this was missing from the trial and obviously crucial on the issue of the effect of drug

addiction on his behavior controls and not before the jury. In Luck, supra, this Court laid down certain guidelines as to how a trial court should exercise its discretion as whether to permit evidence of convictions to be brought to the attention of the jury in the event defendants take the stand, and one of these factors was "the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction. The goal of a criminal trial is the disposition of the charge in accordance with the truth." (p.769) Here as in the prior argument, counsel for appellant at the trial had to elect between the lesser of two evils, but really he had no option at all. The most important evidence in this case, that is, appellant's testimony, was not presented to the jury and the full picture they were never to have.

CONCLUSION

WHEREFORE, it is respectfully requested that the judgment of the lower court be reversed.

JOHN JUDE O'DONNELL
Attorney for Appellant

[illegible]

[illegible]

No. [illegible]

UNITED STATES OF AMERICA, APPELLEE

v.

[illegible]

Appeal from the United States District Court
for the District of Columbia

[illegible]

[illegible]
United States Attorney

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[illegible]

[illegible]

Cr. No. [illegible]

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TABLE OF CASES

OTHER REFERENCE

* Cases chiefly relied upon are marked by an asterisk.

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Whether the trial court abused its discretion in ruling that if the defendant took the stand he could be cross-examined on the facts of the case as well as on the issue of criminal responsibility?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,309

UNITED STATES OF AMERICA, APPELLEE,

v.

ROGER TOLBERT, APPELLANT.

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed October 30, 1967, appellant was charged with robbery (22 D.C. Code § 2901). At trial on June 26, 27, 28, and July 1, 1968, before United States District Judge Oliver Gasch, sitting with a jury, appellant was found guilty as charged. On August 9, 1968, appellant was sentenced to a term of imprisonment for a period of three to ten years. This appeal followed.

The Government's Case

The complaining witness, Maria Pirrone, testified that on September 7, 1967, she had been shopping in the vi-

cinity of 12th and G Streets, N.W., Washington, D.C. At about 1:25 p.m. she went to a bus stop. As she was boarding the bus she felt soemone poking her in the back and she turned around and saw her purse was open. (Tr. 17-19.) She observed appellant and a police officer scuffling and saw her billfold with $7.00 in it on the step of the bus (Tr. 19-22).

Officer Marshal Janifer testified that at about 1:20 p.m. on the day in question he observed appellant and another man walking toward a bus stop with sweaters over their arms (Tr. 25-28). The officer had previously seen photographs of appellant at police headquarters in a police album (Tr. 36-37). Officer Janifer, who was not in uniform, positioned himself directly behind appellant at the bus stop (Tr. 34). He watched as appellant positioned himself behind the complainant as she was boarding the bus. In front of the complainant was the individual who had been seen with appellant earlier. This individual bent over, causing the boarding to stop. Appellant placed his hand in the complainant's pocketbook and took out a brown leather wallet. At this point Officer Janifer identified himself and placed appellant under arrest. Appellant dropped complainant's brown leather wallet on the steps of the bus. (Tr. 28-29.)

Officer James O. Williams was on duty with Officer Janifer on the day in question and observed appellant at the intersection of 12th and G Streets N.W. (Tr. 52). Appellant's companion positioned himself in front of the complainant in order to enter the bus first. Appellant then moved up close behind her. Next he observed Officer Janifer arresting appellant. Officer Williams then arrested appellant's companion (Tr. 54).

The Government rested and appellant's motion for acquittal was denied (Tr. 58-59).

The *Luck* Proceedings

At the close of the Government's case the court inquired of defense counsel whether appellant was going to take the stand. Defense counsel answered that he had advised

appellant not to take the stand. Defense counsel stated that he could not vouch for appellant's credibility in regard to the crime and consequently would not put him on the stand regardless of the court's *Luck* ruling (Tr. 59-60). He said he was not seeking a *Luck* ruling.[1]

As an afterthought defense counsel asked if the court would permit appellant to take the stand and testify about his addiction and not be subject to cross-examination about the facts of the case (Tr. 61-63). The court stated that counsel had expressed reservations about being able to vouch for the credibility of appellant and that each side was entitled to some leaway in cross-examining a witness where credibility was an issue in the case (Tr. 63). The court further stated that it would limit the Government's use of appellant's prior record, but since defense counsel chose not to invoke the court's discretion in that matter, the court had no occasion to indicate to what extent the Government would be limited (Tr. 63-64).[2]

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[1] THE COURT: Do I understand regardless of the Court's ruling on the defendant's prior criminal record, you would advise him not to take the stand?

[DEFENSE COUNSEL]: In light of the history of this case, I don't believe that I could vouch for the defendant's credibility in regard to the crime. Consequently, I would not put him on the stand under those circumstances.

THE COURT: All I am seeking to ascertain whether you want a ruling on the Luck Brown, Brooke, Gordon issue.

[DEFENSE COUNSEL]: No, sir, I cannot offer the defendant as a witness.

THE COURT: All right, sir. You are in charge of the defense.

[DEFENSE COUNSEL]: Very well, Your Honor. I am not offering him.

THE COURT: The Court is simply seeking to act in accordance with a prior decision of the Court of Appeals with respect to that issue, and to exercise my discretion if there is occasion for such exercise, but if the defense has made its decision the defendant is not to take the stand, of course, that does not give rise to the exercise of discretion by the Court. (Tr. 60-61.)

[2] The court noted that defense counsel had indirectly brought out appellant's record by asking the officer about having seen

The Case for the Defense

In his opening statement defense counsel indicated that other than putting the Government to its burden of proof, the entire defense in the case was insanity (Tr. 15-16). In this regard, appellant's first witness was his mother, Mrs. Lottie Smith. She testified that appellant was born on November 22, 1942 (Tr. 65-66). In his early teens she took appellant to a psychiatrist who indicated that appellant was normal (Tr. 65-67). Defense counsel then elicited testimony which in general terms told of appellant's stay at the Receiving Home and the Youth Center (Tr. 68-69). Appellant's mother testified that appellant had a normal homelife and left school in the 10th Grade (Tr. 78-80). Her testimony never expressly mentioned her son's involvement with narcotics.

The next witness for appellant was Dr. George Weickhardt, a psychiatrist on the staff of Saint Elizabeths Hospital. The doctor testified that appellant was admitted to Saint Elizabeths Hospital on January 5, 1968 and was observed by ward personnel for approximately 2½ months (Tr. 95-96). During that period appellant was examined by Dr. Weickhardt on three or four occasions (Tr. 96-97). It was his opinion that on September 7, 1967 appellant was in an intoxicated state due to drugs which he had administered to himself (Tr. 98).

The only mental disorder appellant had was his heroin addiction (Tr. 116). The first mention of narcotic addiction in appellant's hospital file dated from 1964 (Tr. 135). Defense counsel elicited testimony concerning appellant's early criminal record and his need to steal to support his habit (Tr. 99-102). Appellant's involvement with the law, however, started prior to 1964 (Tr. 125, 150). The doctor noted that in intelligence appellant was in the upper 15% of the individuals in the National

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pictures of appellant (Tr. 61). Defense counsel at that time was cautioned at the bench and told the court that this was a tactical decision on his part (Tr. 35-37). Appellant's theory below was that his criminal record would to some extent support his insanity defense (Tr. 62).

Training School and that he showed average intelligence on psychological tests (Tr. 126-127).

Dr. Weickhardt admitted that there was no reliable way for him to tell how much heroin appellant was taking at the time of the robbery (Tr. 181). In answer to a hypothetical question the doctor observed that appellant would know that robbery was wrong (Tr. 191).

Rebuttal

In rebuttal the Government called Dr. Albert E. Marland, a qualified psychiatrist (Tr. 232-237). Dr. Marland had examined appellant on the Friday and Sunday prior to trial (Tr. 233, 237). In testimony premised on certain hypothetical questions, Dr. Marland stated that in his opinion heroin had no long term deteriorating effect on the physical features of the brain (Tr. 264). He also observed that behavior controls of a heroin addict are not impaired to the point where he cannot choose what he ought to do (Tr. 271). In Dr. Marland's opinion appellant was not suffering from any mental disease or defect on September 7, 1967, the day of the robbery (Tr. 252). The Government recalled Officer Janifer who testified that he had observed narcotics addicts on prior occasions going through withdrawal symptoms, and that during the period of the arrest and the subsequent paper work he did not observe appellant in this state (Tr. 283, 289).

The court went over the proposed instructions on addiction-insanity with counsel and appellant's experienced Legal Aid Attorney announced no objection to the instructions (Tr. 309).

ARGUMENT

The trial court did not abuse its discretion in ruling that if the defendant took the stand he could be cross-examined on the facts of the case as well as on the issue of criminal responsibility.

(Tr. 15-16, 35-37, 61-62, 99-102, 116, 252, 313)

Appellant contends that the trial court committed reversible error in not allowing him to take the stand and testify concerning his narcotics addiction without being subject to cross-examination on the facts of the case. Appellant's contention is without merit.

We note initially that matters involving the scope and extent of cross-examination are addressed to the sound discretion of the trial court. It is proper to elicit full details of matters stated only in part upon direct examination and anything tending to contradict, modify or explain the testimony on direct can be brought out. *Branch* v. *United States*, 84 U.S. App. D.C. 165, 171 F.2d 337 (1948); *Mintz* v. *Premier Cab Ass'n*, 75 U.S. App. D.C. 389, 127 F.2d 744 (1942). Clearly nothing is more relevant to the issue in this case than appellant's state of mind at the time he committed the offense.

Appellant's premise on appeal is that prejudice would have resulted had he been cross-examined both on the merits and on the issue of criminal responsibility. Appellant appears to be arguing that the trial should have been bifurcated under under *Holmes* v. *United States*, 124 U.S. App. D.C. 152, 363 F.2d 281 (1966). Bifurcation, however, lies in the first instance within the "sound discretion" of the trial court. *Contee* v. *United States*, D.C. Cir. No. 21,693, decided February 14, 1969; *Holmes* v. *United States*, *supra* at 154, 363 F.2d at 284. Appellant's experienced Legal Aid Attorney at trial chose not to request bifurcation. Having failed to invoke the trial court's discretion below, appellant is foreclosed from raising the issue on appeal. *Harried* v. *United States*, 128 U.S. App. D.C. 330, 389 F.2d 281, 284 (1967).

Moreover, even had a motion for bifurcation been made, it would have been properly denied. Bifurcation will only be granted where a defendant shows at trial that he has a substantial insanity defense and a substantial defense on the merits, either of which would be prejudiced by simultaneous presentation with the other. *Contee* v. *United States, supra,* slip op. at 2-3; *Higgins* v. *United States,* 130 U.S. App. D.C. 331, 401 F.2d 396 (1968); *Parman* v. *United States,* 130 U.S. App. D.C. 188, 190, 399 F.2d 559, 561 (1968); *Harried* v. *United States, supra.* If there was to be no defense "beyond putting the Government to its proof" there can be no prejudice to the defense on the merits due to a failure to bifurcate. *Harried* v. *United States, supra* at 333, 389 F.2d at 284. At trial in the instant case counsel indicated that his only defense on the merits was putting the Government to its proof (Tr. 15-16). In the face of Officer Janifer's eye-witness testimony, no other defense was possible.

Furthermore, it is doubtful whether appellant had a substantial insanity defense. The fact of narcotic addiction, standing alone, does not permit a finding of mental disease or defect. It must either be accompanied by evidence of mental illness or the addiction must be so extensive and protracted as to deteriorate behavior controls. See, *e.g., Gaskins* v. *United States,* D.C. Cir. No. 20,252, decided December 20, 1967; *Green* v. *United States,* —— U.S. App. D.C. ——, 383 F.2d 199 (1967). In the instant case Dr. Weickhardt testified that appellant's only mental disorder was his heroin addiction (Tr. 116). Moreover, appellant had not been a heroin addict for a long period of time prior to the commission of this offense. In the opinion of Dr. Marland appellant was not suffering from any mental disease or defect at the time of the robbery (Tr. 252). Therefore, appellant may not even have presented the substantial insanity defense necessary for bifurcation. *Higgins* v. *United States, supra.*

Accordingly, the trial court's handling of this issue, whether framed in terms of cross-examination or bifurcation, was entirely proper.[3]

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JOHN D. ALDOCK,
Assistant United States Attorneys.

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[3] Appellant contends that the trial court abused its discretion in handling the *Luck* issue (Appellant's Brief at 10-12). Discretion uninvoked, however, can hardly be abused. *Hood* v. *United States*, 125 U.S. App. D.C. 16, 365 F.2d 949 (1966); *Smith* v. *United States*, —— U.S. App. D.C. ——, 406 F.2d 667 (1968). At trial defense counsel stated he was not going to put the defendant on the stand regardless of the court's *Luck* ruling and consequently was not seeking a ruling (Tr. 60-64) (See Appellee's Counterstatement at 2-3). Furthermore, defense counsel brought out evidence of appellant's prior criminal record in order to bolster his insanity defense (Tr. 35-37, 61, 62, 99-102, 313) (See Appellee's Counterstatement at 3-4 n.2). See *Suggs* v. *United States*, —— U.S. App. D.C. ——, 407 F.2d 1272 (1969) (where defendant at trial "made no request for exclusion" and in fact "opened [this] line of inquiry . . . to bolster his claim of exculpation because of intoxication," the trial judge was under no duty *sua sponte* to exclude prior convictions). Accordingly, appellant's contention is without merit.

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